FILE COPY.

(1)

Supreme Court, U.S.
FILED
971724 JAN 21 1998
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES HUNT BARKER - - - - *Petitioner*

versus

MARY JO LEEDS, Et. Al. - - - - *Respondents*

On Petition for Writ of Certiorari to the
Supreme Court of the Commonwealth of Kentucky

PETITION FOR WRIT OF CERTIORARI

JAMES HUNT BARKER
416 Brazilian Avenue
Palm Beach, Florida 33480
(561) 659-7978
Pro Se

April 10, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

18 pp

QUESTIONS PRESENTED FOR REVIEW

Did the Judgment of the Kentucky Supreme Court, denying Petitioner's Motion for an Enlargement of Time in which to File a Motion for Discretionary Review, deny Petition the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

Did the Order sought to be appealed from, sanctioning Petitioner for filing supposedly "frivolous" motions in the Kentucky Court of Appeals, deny Petitioner the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES HUNT BARKER - - - - - - - - - *Petitioner*

versus

MARY JO LEEDS, ET. AL. - - - - - - *Respondents*

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James Hunt Barker, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Kentucky Supreme Court entered in the above entitled case on October 23, 1997.

OPINIONS BELOW

The Judgment of the Kentucky Supreme Court (Appendix A) was entered on October 23, 1997. The Judgments of the Kentucky Court of Appeals were entered on March 18, 1997 and June 19, 1997 (Appendix B & C respectively). This action originated in the Kentucky Court of Appeals, therefore, there is no Order from the Fayette Circuit Court.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257.

QUESTIONS PRESENTED FOR REVIEW

Did the Judgment of the Kentucky Supreme Court, denying Petitioner's Motion for an Enlargement of Time in which to File a Motion for Discretionary Review, deny Petition the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

Did the Order sought to be appealed from, sanctioning Petitioner for filing supposedly "frivolous" motions in the Kentucky Court of Appeals, deny Petitioner the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATUTE INVOLVED

"No person shall be. . . deprived of life, liberty, or property, without due process of law." Constitution of the United States of America, Amendment V.

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " Constitution of the United States of America, Amendment XIV.

STATEMENT OF CASE

This action arises out of a will contest. In 1990, Fayette Circuit Court entered an agreed settlement, over the protests of Petitioner, who stated in open court that he did not consent to the settlement which was being forced upon him by his attorneys.

Petitioner appealed from the Judgment approving this agreed settlement to the Kentucky Court of Appeals; that court affirmed the judgment of the Fayette Circuit Court. Petitioner subsequently moved the Kentucky Court of Appeals to set aside this Judgment, pursuant to CR 60.02, on

the grounds that a judgment by consent is not subject to appeal, since an agreed settlement does not present a "case" or "controversy" within the meaning of the state and federal constitutions.

The court denied the Petitioner's Motion; it also sanctioned the Petitioner more than $9,000.00 for filing a supposedly "frivolous" motion. Petitioner then moved the Kentucky Supreme Court to grant Discretionary Review of this Judgment imposing sanctions. In his Motion, Petitioner alleged that the law concerning the applicability of CR 60.02 to Appellate Courts in Kentucky was unclear, and that he could not reasonably have known, based on existing case law, that such Motion was "frivolous."

Petitioner filed this Motion as a *pro se* litigant. He telephoned the Kentucky Supreme Court clerk, and was instructed that he could file the Motion by depositing it in the United States mail. The clerk did not tell Petitioner that the Motion must be sent via registered United States mail. The Petitioner, accordingly, sent the Motion from his home in Nantucket, Massachusetts to the court via certified, return receipt requested.

The Kentucky Supreme Court never returned the motion to him with a letter explaining that the Motion should have been sent via registered United States mail. Petitioner moved the court to grant him an enlargement of time in which to file his Motion for Discretionary Review. The court denied this Motion by Order entered of record October 23, 1997. *See*, Appendix A.

REASONS FOR GRANTING WRIT

Kentucky's C.R. 6.02, like Rule 6(b), F.R.C.P., provides that a court may extend the time allowed for the doing of an act, if the movant therefor demonstrates "excusable neglect." This phrase means "a failure to take the proper steps at the proper time, not in consequence of the party's

own carelessness, inattention, or willful disregard for the processes of the court, but in consequence of some unexpected or unavoidable hindrance or accident or reliance on the care and vigilance of his counsel or on promises made by the adverse party." Black's Law Dictionary at 675 (rev. 4th ed. 1968), *citing* 1 Black on Judgments § 3.40.

Excusable neg'ect requires a demonstration of good faith on the part of the party seeking an enlargement, and some reasonable basis for non-compliance within the time specified in the rules. What may constitute excusable neglect cannot be categorically stated. Wright & Miller, Fed. Prac. & Proc.: Civil 2d § 1165. However, a number of courts have held that unfamiliarity with, or a misapprehension of, the rules of court constitutes excusable neglect. *Graham v. Pennsylvania Railroad*, 342 F.2d 914 (D.C. Cir. 1964); *Ohlinger v. United States*, 135 F.Supp. 40 (D. Idaho 1955); *Brust v. Industrial Bank of Commerce*, 18 F.R.D. 90 (S.D.N.Y. 1955); *Alfred Hoffman, Inc. v. Textile Mach. Works*, 27 F. Supp. 431 (E.D. Pa. 1939).

In the instant case, the Petitioner has clearly met his burden of demonstrating excusable neglect. Courts do not hold *pro se* litigants to the same standard of care as is expected of attorneys. Petitioner obviously made a good faith effort to comply with the rules of procedure as he understood them. He should not be deprived of his day in court on the technicality that he mailed the Motion via certified mail rather than registered mail.

It is ironic that the Kentucky Supreme Court actually received the Motion several days earlier than it would have done, had the Petitioner sent the Motion via registered mail. The Petitioner has suffered the loss of his cause of action for a purely technical defect, which did not prejudice the court or the rights of the parties in any way.

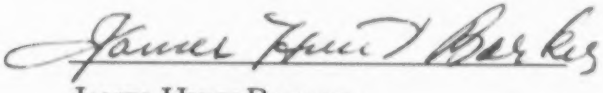
Furthermore, the Petitioner had a meritorious argument which he wished to present to the Kentucky Supreme Court. The Petitioner, a non-lawyer, was sanctioned for failing to realize that a Judgment of the Kentucky Court of Appeals could not be collaterally attacked in that court pursuant to C.R. 60.02. There is nothing in the language of the Rule that precludes its applicability in Appellate Courts. Indeed, the general rule is that the Judgment of any Court may be collaterally attacked for lack of subject-matter jurisdiction, *cf.*, Rule 12(b)(1), F.R.C.P.; *Rath Packing Co.* v. *Becker*, 530 F.2d 1295 (9th Cir. 1975); CR 12.08(3). It is noteworthy that the Kentucky Court of Appeals cited no authority whatever for its holding that its Judgments are not subject to collateral attack.

Petitioner reiterates, he was denied the right to present this meritorious argument to the Kentucky Supreme Court on the basis of a purely technical defect which did not prejudice either the court or the parties in any way. This constituted a clear violation of the Petitioner's Due Process rights.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



JAMES HUNT BARKER
416 Brazilian Avenue
Palm Beach, FL 33480
Pro Se

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served, via first-class United States mail, postage pre-paid, upon Mr. Julius Rather, Esq., 156 Market Street, Lexington, Kentucky, 40502; Ms. Diane Carlton, Mr. Charles E. Shival, Esq., and Ms. Susan B. Jones, Stoll, Keenon & Parks, Suite 1000, 201 E. Main Street, Lexington, Kentucky, 40507-1380; Mr. Bruce Lankford, Esq. College of Law, University of Kentucky, Room 2, Administration Bldg., Lexington, Kentucky, 40506; and Mr. Walter May, Esq., Suite 1000, 167 W. Main Street, Lexington, Kentucky, 40507, this 9 day of April, 1998.

James Hunt Barker

JAMES HUNT BARKER
416 Brazilian Avenue
Palm Beach, FL 33480
Pro Se

APPENDIX A

SUPREME COURT OF KENTUCKY

97-SC-618-D

On Review From Court Of Appeals
Nos. 91-CA-205-MR, 95-CA-1236-MR,
95-CA-1237-MR, & 95-CA-2439-MR
Fayette Circuit Court No. 88-CI-424

JAMES HUNT BARKER - - - - - - - *Movant*

v.

MARY JO LEEDS, Et Al. - - - - *Respondents*

ORDER

Movant's belated motion for an enlargement of time in which to file a motion for discretionary review in the above-styled action is denied.

Wintersheimer, Cooper, Graves, and Johnstone, JJ., sitting.

All concur.

ENTERED: October 23, 1997

/s/ _____
Chief Justice

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 91-CA-205-MR

JAMES HUNT BARKER - - - - - - *Appellant*

v.

MARY JO LEEDS, Et Al. - - - - *Appellees*

Appeal From Fayette Circuit Court
Action No. 88-CI-424

AND
No. 95-CA-1236-MR
JAMES HUNT BARKER, ET AL., APPELLANTS
v.
MARY JO LEEDS, ET AL., APPELLEES
Appeal From Fayette Circuit Court
Action No. 88-CI-424

AND
No. 95-CA-1237-MR
JAMES HUNT BARKER, ET AL., APPELLANTS
v.
MARY JO LEEDS, ET AL., APPELLEES
Appeal From Fayette Circuit Court
Action No. 88-CI-424

AND
No. 96-CA-2439-MR
JAMES HUNT BARKER, ET AL., APPELLANTS
v.
BILLIE BELL, ET AL., APPELLEES
Appeal From Fayette Circuit Court
Action No. 88-CI-424

ORDER

BEFORE: WILHOIT, CHIEF JUDGE; GUDGEL AND GUIDUGLI, JUDGES.

Pursuant to this Court's order entered January 9, 1997, a show cause hearing was held on March 4, 1997, to assist the Court's disposition of motions for sanctions filed by appellee, First Security National Bank and Trust Company of Lexington (now Bank One, Lexington N.A.) and by appellees Charities.[1] Appellant, James Hunt Barker, and his counsel, William Lloyd Turner, appeared, as well as counsel for the moving appellees. Pro se appellee, W. Henry Graddy IV, also appeared.

The Court has considered appellees' motions for sanctions and the arguments made at the hearing and, being sufficiently advised, ORDERS the motions be GRANTED.

A brief history of the action below is necessary to establish the background of the matter at bench. The action below is a will contest which started in 1988. The trial was not conducted as the parties informed the court they had reached a settlement. However, about a month after the settlement was reached, but before it was memorialized in written form, appellant informed his attorneys that he was cancelling their authority to settle the case. The appellees moved the Fayette Circuit Court for enforcement of the agreement and entry of a judgment. Their motion was granted. This Court affirmed (case No. 91-CA-0205-MR), holding that the evidence supported the finding that appellant had settled the case and that his attorneys had acted within the scope of their authority when they negotiated the settlement. The Kentucky Supreme Court denied discretionary review. The judgment became final on April 14, 1993. Appellant subsequently filed two motions pursuant to CR 60.02 which were both denied. One of those

---

[1] Appellees Blue Grass Council of the Blind, Lexington Braille Guild, American Council of the Blind, and Guiding Eyes for the Blind are herein collectively referred to as the Charities.

motions resulted in the filing of two duplicate appeals (cases No. 95-CA-1236-MR and No. 95-CA-1237-MR) which were dismissed due to appellant's failure to meet the time requirements of CR 76.03. The other motion resulted in yet another appeal (case No. 96-CA-2439-MR) which was dismissed due to appellant's failure to name indispensable parties.

In addition, the record shows that appellant further attempted to have the final judgment of April 14, 1993, set aside by initiating two federal suits; one federal appeal; two collateral attacks in the Fayette District Court; two appeals in the Fayette Circuit Court; and a third motion pursuant to CR 60.02 in the Fayette Circuit Court.

The appellees' motions for sanctions and the oral hearing were prompted by what appellant and his counsel characterized as motions to set aside judgment pursuant to CR 60.02 which were filed in this Court in appeals No. 91-CA-205-MR, No. 95-CA-1236-MR, and 95-CA-1237-MR. The argument made in the motions was that the Fayette Circuit Court lacked subject matter jurisdiction to enter the original judgment, thereby rendering that judgment void ab initio. The argument expanded into a further statement that the Court of Appeals itself lacked jurisdiction to review the judgment, which rendered its opinion void.

Appellant himself invoked the jurisdiction of the Fayette Circuit Court when he filed his action as well as his numerous post-judgment motions. Appellant himself invoked the jurisdiction of this Court when he filed his appeals. There can be no question that the circuit court had subject matter jurisdiction to hear this will contest and that this Court had jurisdiction to review the circuit court's judgment disposing of the action. Appellant's jurisdictional challenge is utterly meritless. Likewise, his actions since 1993, with the assistance of counsel, were taken in complete disregard of the law of the case and of res judicata, and have been nothing but relentless abuse of the judicial system and harassment of the appellees.

Appellant and his counsel appear to believe that their latest motions presented a rational argument to the Court.

However, their belief cannot be the basis for this Court's determination as to whether their motions are frivolous. Such a determination may only be made objectively on the basis of the record. Leasor v. Redmon, Ky., 734 S.W.2d 462, 464 (1987). In view of the case history related above, it is clear that the record speaks for itself. We conclude that the motions filed by appellant, James Hunt Barker, and by his counsel, William Lloyd Turner, are so totally lacking in merit that they appear to have been taken in bad faith. The motions are frivolous and, therefore, sanctions are warranted.

CR 73.02(4) provides that the Court may award just damages and single or double costs to the moving appellees. The appellees shall have fifteen (15) days from the date of entry of this order in which to submit their counsel's affidavit of the totality of the damages and costs they incurred in responding to the frivolous motions and in seeking affirmative relief therefrom. James Hunt Barker and William Lloyd Turner will then each have fifteen (15) days from the date of filing of the last appellee's affidavit in which to respond. The affidavits and the responses shall be filed in quintuplicate.

Upon filing of the responses, or at the expiration of thirty (30) days, the Court shall dispose of the matter by further order. In setting the amount of the sanctions, the Court will remain mindful of the fact that the frivolous motions are only the most recent illustrations of a protracted pattern of abuse and waste of judicial and legal resources.

The Clerk of the Court of Appeals is DIRECTED to mail a copy of this order by U.S. Certified Mail with Return Receipt Requested to James Hunt Barker and to William Lloyd Turner.

ENTERED: MAR 18 1997

/s/ _____
Chief Judge, Court of Appeals

APPENDIX C

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 91-CA-205-MR

JAMES HUNT BARKER - - - - - *Appellant*

v.

MARY JO LEEDS, Et Al. - - - - *Appellees*

Appeal From Fayette Circuit Court
Action No. 88-CI-424

AND
No. 95-CA-1236-MR
JAMES HUNT BARKER, ET AL., APPELLANTS
v.
MARY JO LEEDS, ET AL., APPELLEES
Appeal From Fayette Circuit Court
Action No. 88-CI-424

AND
No. 95-CA-1237-MR
JAMES HUNT BARKER, ET AL., APPELLANTS
v.
MARY JO LEEDS, ET AL., APPELLEES
Appeal From Fayette Circuit Court
Action No. 88-CI-424

AND
No. 96-CA-2439-MR
JAMES HUNT BARKER, ET AL., APPELLANTS
v.
BILLIE BELL, ET AL., APPELLEES
Appeal From Fayette Circuit Court
Action No. 88-CI-424

ORDER

BEFORE: WILHOIT, Chief Judge; GUDGEL and GUIDUGLI, Judges.

This is before the court for consideration of affidavits filed by the appellees pursuant to this court's March 18, 1997, order. The affidavits specify the costs and damages incurred by the appellees in responding to the latest attempts by the appellant, James Hunt Barker, to challenge a Fayette Circuit Court judgment entered December 11, 1990.

In his latest bids to attack the December 1990 circuit court judgment, the appellant claims that the circuit court lacked subject matter jurisdiction to enter the judgment. He also contends that this court, which affirmed the judgment by opinion rendered November 13, 1992, likewise lacked subject matter jurisdiction over the appeal and that the opinion is therefore void. The appellant furnishes a myriad of legal citations regarding subject matter jurisdiction, but does not explain their relevancy to this litigation except to state that this court does not have jurisdiction of an appeal from a consent judgment. The appellant misconstrues the concept of subject matter jurisdiction. Subject matter jurisdiction was explained in *Duncan* v. *O'Nan*, Ky., 451 S.W.2d 626 (1970). Quoting from *In re Estate of Rougeron*, 17 N.Y.2d 264, 271, 270 N.Y.S.2d 578, 583, 217 N.E.2d 639, 643, (1966) the court stated as follows:

> In other words the rule that subject-matter jurisdiction cannot be born of waiver, consent or estoppel has to do with those cases only where the court has not been given any power to do anything at all in such a case, as where a tribunal vested with civil competence attempts to convict a citizen of a crime. In other words, "subject matter" does not mean "this case" but "this kind of case."

Duncan, 451 S.W.2d at 631. The circuit court had subject matter jurisdiction over the will contest action and this court had subject matter jurisdiction over the appeal of the final judgment in the will contest action. Both the circuit

court and this court had subject matter jurisdiction over "this kind of case." *See id.* The authorities cited by the appellant in support of his argument that this court lacked jurisdiction over an appeal of a consent judgment pertain to the limited, authority of a court to modify a settlement agreement. The settlement agreement was not modified by the circuit court or by this court. The findings of fact and conclusions of law accompanying the entry of the December 1990 circuit court judgment related to whether there existed an enforceable settlement. The issues on appeal of the judgment concerned the sufficiency of the evidence to support the circuit court's findings that will contest action was settled and that the appellant's attorneys acted within the scope of their authority. The appeal was not from a consent judgment, but from a judgment which enforced a settlement agreement. Review of the circuit court order by this court was proper. *See, e.g., Keach* v. *Keach,* 217 Ky. 723, 290 S.W. 708 (1927); *Karnes* v. *Black,* 185 Ky. 410, 215 S.W. 191 (1919).

The time for the conclusion of this litigation is long past due. In its order entered July 26, 1996, the circuit court succinctly explained the reasons that the grounds alleged in the appellant's CR 60.02 motion did not justify the extraordinary relief provided by that rule. No other grounds advocated by the appellant in this court or other courts warrant setting aside the circuit courts December 11, 1990, judgment or this court's November 13, 1992, opinion. *See, e.g., Gross* v. *Commonwealth,* Ky., 648 S.W.2d 853 (1983); *Yocum* v. *Bratcher,* Ky., 578 S.W.2d 44 (1979); *Beazley* v. *Mershon,* 69 Ky. (6 Bush) 424 (1869).

This court, in its order of March 18, 1997, found that the latest motions filed by the appellant, James Hunt Barker, are so totally lacking in merit that they appear to have been taken in bad faith. The appellees' attorneys filed affidavits with the court verifying the amount of damages and costs incurred in litigating the latest round of proceedings. The response filed by the appellant does not contest the reasonableness of the amounts claimed by the

appellees; rather, the pro se response discloses the appellant's difficulties with his counsel and reiterates arguments previously advanced.

This matter is hereby REMANDED to the circuit court for the entry of a judgment against James Hunt Barker in favor of the appellee, First Security National Bank & Trust Company of Lexington, in the amount of $8,458.00. The circuit court shall also enter a judgment against James Hunt Barker in favor of the "Charities" in the amount of $1,424.00. The circuit court may use all proper means to enforce the judgments.

The motion filed by W. Henry Graddy, IV, for an enlargement of time to file a response is DENIED. The relief sought by Mr. Graddy, stated in his notice of order of garnishment, lies within the discretion of the circuit court.

/s/ _____
Chief Judge, Court of Appeals

ENTERED: JUN 19 1997